5/10/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
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	)	
1833 NOSTRAND AVENUE CORPORATION, et al.	)	Docket Nos.: [UST] II-RCRA-93-0205 et al.
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	)	
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	)	
Respondents.	)	

ORDER DENYING PARTIAL ACCELERATED DECISION AND COMPLIANCE ORDER

These are consolidated proceedings brought pursuant to the Solid Waste Disposal Act, as amended (hereafter "SWDA"), §9006, 42 U.S.C. §6991e, charging Respondent 1833 Nostrand Avenue Corporation as the owner of underground storage tank systems ("UST systems"), with violations of the Act and the regulations promulgated thereunder. At issue is Respondent's alleged noncompliance with the regulatory requirements for owners and operators of UST systems (40 C.F.R. Part 280) located at five gasoline service stations owned by Respondent.[1] For all five service stations, Respondent is charged

[1] Five separate complaints, one for each gasoline service station, were originally issued, bearing Docket Nos. 0205 through 0209. In four of these cases, Docket Nos. 0206, 0207, 0208 and 0209, the operators were also named as respondents. The complaints against the operators in three of these cases, Docket Nos. 0207, 0208 and 0209, have been settled by consent orders. The complaint against the operator in the fourth case, Docket No. 0206, has not been settled. By my order of April 21, 1995, the cases against

with failing to maintain release detection and tank tightness testing records as required by 40 C.F.R. §280.45, and with failing to provide a method or combination of methods of release detection for petroleum UST systems. Release detection is defined as determining whether a release of a regulated substance (petroleum product or hazardous waste) has occurred from the UST system into the environment or into the interstitial space between the UST system and its secondary barrier or secondary containment around it.[2] For one station, Respondent is also charged with failing to temporarily close the UST systems as required by 40 C.F.R. §280.70(b).[3]

Complainant, pursuant to 40 CFR §22.20, has moved for a partial accelerated decision finding Respondent liable for the violations, leaving for resolution only the appropriate penalty for the violations found. Complainant also moves for an order compelling Respondent to immediately comply with the regulatory requirements for UST systems.

Factual Background

The UST systems are located at five gasoline service stations in Brooklyn, NY. Not disputed is that Respondent owns these service stations along with their UST systems. At all times relevant here the stations were not operated by Respondent but leased to third

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Respondent were consolidated. The case against the operator in Docket No. 0206, Wee Service Centers, Inc, was kept as a separate proceeding.

[2] 40 C.F.R. § 280.12.

[3] Docket No. 0205.

party operators. It also appears that Respondent did not supply the petroleum dispensed at these stations. Using Respondent's nomenclature, the service stations may be identified as follows: Pen & Flat, 1121 Pennsylvania Ave.; Wee Service Centers, 1244 Utica Avenue; Fermin Service Station, 750 New York Ave.; One Stop Auto, 502 Avenue P; and Gurmeet Gas, 1833 Nostrand Avenue.

The EPA in March 1992, inspected Respondent's records of its compliance with the UST system requirements. It then asked for specific information about Respondent's compliance in a written request dated April 6, 1992, which, because of deficiencies noted in Respondent's responses, was followed by a further written request dated September 2, 1992.[4] On July 8, 1992, the stations were also visited by an EPA representative, John Hansen.[5]

Under the EPA regulations, owners and operators of UST systems installed prior to 1975 were required to comply with the release detection requirements by December 22, 1991.[6] They were also required to keep records of their recent compliance.[7] The papers show as follows with the respect to the number of tanks and their installation dates at each of the service stations:

Penn & Flat: 9 UST systems were located at this facility. One was installed in 1977, one was installed in 1970 and seven were

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[4] Complainant's Exhibits ("CX") 3, 5.

[5] Affidavit of John Hansen ("Hansen Affidavit"), CX 9.

[6] 40 C.F.R. § 280.40(c).

[7] 40 C.F.R. § 280.34 and § 280.45.

installed either in 1969 or at an unknown date.[8]

Wee Service Station: 5 UST systems were located at this station, three were installed in 1966 and two were installed at an unknown date.[9]

Fermin Service Station: 5 UST systems were located at this station. Four were admittedly installed at an unknown date. There is a discrepancy in the record as to whether the fifth system, a 2000 gallon tank, was installed in 1982 or at an unknown date but the EPA seems to accept the 1982 date.[10]

One Stop Auto: 6 UST systems were located at this station, all installed in 1962.[11]

Gurmeet Gas: 10 UST systems were located at this facility. Three were installed in 1964. Again there is a discrepancy in the record with respect to whether all remaining seven were installed in 1968 or whether two of those seven were installed at an unknown

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[8] Respondent reported to the EPA that one tank with a capacity of 4000 gallons was installed in 1977, one tank with a capacity of 4000 gallons was installed in 1970 and 7 tanks with a capacity of 550 gallons each were installed at dates unknown (CX 4a). In the State Petroleum Bulk Storage Certificate, however, Respondent reported the seven 550-gallon tanks as being installed in 1969 (CX 8a). (The installation date of 11/07 shown for one tank, reported as 2400 gallon capacity rather than 4000 gallons, is probably an error.) In any event, the record would show that only one of the nine tanks was installed after 1970.

[9] CX 4b; 8.

[10] Compare CX 4c with CX 8c. The 1982 date accords with the complaint.

[11] CX 8d.

date.[12]

Thus, the record shows that at the five service stations there were an aggregate of 33 UST systems owned by Respondent and leased to operators for which at the time of the EPA's investigation in March 1992, Respondent and the operators had to have release detection in place and to maintain records of their recent compliance with the leak detection requirements.

As to the release detection used at the five facilities, Respondent asserts that as company policy in the course of operating the facilities at issue, it instructs the tenants/operators monthly to conduct manual inventory reconciliation and perform daily stick readings to the nearest 1/8 of an inch as well as providing them with a tank conversion chart. Respondent further asserts that while tank tightness tests are the primary responsibility of the tenants/operators, it has in recent years arranged for the performance of annual tank tightness tests to ensure such performance and has contracted with third parties to do these tests.[13]

It appears from the information submitted by Respondent that the release detection methods in place or that should have been in place at these service stations most resembles the "inventory control" method used in conjunction with tank tightness testing.

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[12] Compare CX 4e with CX 8e. The complaint alleges six as having been installed in 1968 and one installed at an unknown date. In any case, compliance would have been required by December 22, 1991.

[13] Affidavit of Jonathan Halperin submitted in opposition to Complainant's motion ("Halperin Affidavit") ¶¶ 13-15.

Inventory control entails measuring inputs, withdrawals, and the amount remaining in the tank (to the nearest 1/8 inch) each operating day. Inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery, and product dispensing is metered and recorded. The water level in the bottom of the tank is to be measured at least once a month (to the nearest 1/8 inch). The numbers for each tank must be examined monthly to detect a release of at least %1.0 of flow-through plus 130 gallons.[14]

Tank tightness testing must be capable of detecting a leak of a 1/10 gallon per hour leak rate from a tank that routinely contains product while accounting for the effects of thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation and the location of the water table.[15]

Ust system owners and operators must maintain records demonstrating their compliance with the release detection requirements. Among the records required to be maintained are monitoring results, which must be maintained for at least 1 year,

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[14]40 C.F.R. § 280.43(a). Also allowed is "manual tank gauging." Under this method, level measurements are taken at the beginning and ending of a period of at least 36 hours during which no liquid is added to or removed from the tank and are based on the average of two consecutive stick readings using equipment capable of measuring to the nearest 1/8 inch. 40 C.F.R. 280.43(b). It is not clear whether Respondent was also using this method, since the data submitted by Respondent shows daily stick measurements. See e.g., Respondent's Prehearing Exchange ("RPE") (Dkt. 0206), Ex. I; RPE (Dkt. 0207) Ex. H; RPE (Dkt. 0208) Ex. H; RPE (Dkt. 0209) Ex. H; Halperin Affidavit Exs. C, D and G.

[15]40 C.F.R. § 280.43(c).

except that the results of tank tightness testing must be maintained until the next test is conducted.[16]

The factual arguments made with respect to Respondent's compliance with the release detection and recordkeeping requirements for each of these stations at the time of the EPA's investigation in 1992, and, in the case of Penn and Flat, Respondent's compliance with the temporary closure requirements as of September 21, 1992, are as follows:

Penn & Flat: Respondent in response to the EPA's request for information for the UST systems at this service station did not provide either records showing the release detection methods relied upon or any monthly monitoring data for the period involved. The EPA's representative, John Hansen, on his visit to the facility on July 8, 1992, also failed to obtain any information about the facility's recordkeeping or release detection from persons at the station on his visit. He also noted that the station appeared to be closed.[17]

The facts as stated by Respondent are that the property had been leased to a tenant/operator whom Respondent dispossessed on November 1, 1991. To Respondent's knowledge the last day of gasoline sales was October 31, 1991. Gasoline was not sold on the site until the tanks were reopened after December 17, 1993, following the lease of the facility to a new tenant/operator. When the tenant/operator who was dispossessed was in possession, he

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[16] 40 C.F.R. § 280.45

[17] CX 4a, 6a; Hansen Affidavit (CX 9), ¶¶ 21 and 22.

refused to allow Respondent to enter the facility and to provide Respondent with the relevant information so it could determine the extent of the tenant/operator's compliance with the UST system requirements. Since the tenant/operator purchased his gasoline from sources unknown to Respondent, Respondent did not know how much gasoline the tenant/operator sold. Thus, because of the tenant/operator's refusal to cooperate with Respondent, Respondent did not have records of daily stick readings or tank tightness testing.[18]

Immediately following the tenant's departure, the tanks were emptied to the extent possible. A minimal amount of gasoline which represented product below the tanks' suction pipe could not be removed and remained in the tank on September 21, 1992.[19] The tanks were temporarily sealed on or about September 23, 1992.[20]

Wee Service Center: In response to the EPA's information requests, Respondent reported that it had a leak detection method using manual inventory reconciliation via stick readings, but the documentation was not given to Respondent so as to be available at the time of the EPA's inspection although Respondent had demanded it. According to Respondent, the tenant was instructed to maintain manual inventory records and do daily stick readings. Respondent was subsequently able to provide copies of daily stick readings for

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[18] CX 4a, 6a; Halperin Affidavit ¶¶ 24-31.

[19] CX 6a.

[20] Halperin Affidavit ¶ 35; RPE, Ex. F.

the period March 24, 1992, through August 22, 1992.[21] The EPA's inspector, Mr. Hansen, on his visit to the facility on July 8, 1992, was told by an unidentified station attendant that the release detection records were locked in the manager's office and that the manager was not there on that date. The station attendant was unable to give Mr. Hansen any information regarding release detection at the facility.[22]

Fermin Service Station: According to Respondent, the tenant/operator here had been instructed monthly by Respondent to maintain manual inventory records and perform daily stick readings. Despite "due demand", copies of the tank reconciliation records and tank tightness testing had not been provided to Respondent by the tenant/operator at the time of the EPA's 1992 inspection. John Hansen, an EPA representative, visited the station on July 8, 1992. He spoke with Juan Firmin and asked for the records of release detection. He was told that the records could not be found and that he would have to speak to the manager's brother, Miguel Firmin, to obtain the records. Juan Firmin also told Mr. Hansen that the method of release detection used was to measure the tanks every other day via stick reading to the nearest inch.[23]

Respondent was subsequently able to provide the EPA with copies of daily inventory sheets for the period July 1992 through

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[21] CX 4b, 6b,; Halperin Affidavit, ¶¶ 42 - 43; Respondent's Prehearing Exchange ("RPE") (Dkt. 0206), Exhibit I.

[22] Hansen Affidavit (CX 9), ¶¶ 23 - 24).

[23] Hansen Affidavit (CX 9), ¶¶ 25-26.

February 18, 1994, after which time no more gasoline was sold.[24]

One Stop Auto: Respondent reported that the method of release detection used for the USTs are manual stick readings and inventory reconciliations. Respondent instructed the tenant/operator to maintain inventory records and to take daily stick readings. The tenant/operator, however, has not provided Respondent with the monitoring data for the period October 1991 through January 1992. Respondent does not own or supply the gasoline stored in the USTs. Tank testing is also the responsibility of the tenant and he has not given Respondent a copy of a precision test for the 1991 year. Respondent subsequently obtained and provided the EPA with copies of the operator's daily inventory sheets for the period April 1, 1992 through November 1993, and February 1994 through April 29, 1994.[25]

Mr. Hansen, on his visit to the facility on July 8, 1992, spoke with an unidentified station manager who told Mr. Hansen that the release detection records were kept on the site but that he could not provide them to Hansen. The person with whom Hansen spoke admitted that Respondent had instructed him to keep a monthly stick inventory on or about April 1, 1992. He gave Hansen a log of gasoline purchases and pump meter readings to review. He also told Hansen that the method of release detection used was to measure the tanks daily to the nearest inch.[26]

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[24] Halperin Affidavit ¶ 54; RPE (DKT 0207) EX. H.

[25] Halperin Affidavit ¶¶ 55-58; CX 6d.

[26] Hansen Affidavit (CX 9) ¶¶ 27-28.

Gurmeet Gas: Respondent instructed the tenant/operator to maintain manual inventory records and do daily stick readings. The tenant/operator has not given Respondent this information or delivery receipts even after repeated requests by Respondent for the information. The records for the period November 1, 1992 through April 30, 1994, were provided to the EPA on their receipt by Respondent. Respondent does not supply gasoline to the operator or own the gasoline stored in the tanks.[27]

Mr. Hansen on his visit to the facility on July 8, 1992, spoke first to a station attendant who declined to give his name. Mr. Hansen asked to review records of release detection at the facility and the attendant provided an inventory sheet for that day which had tank levels to the nearest whole inch. The attendant further said that the rest of the records were given to the manager and stored elsewhere. The attendant also told Mr. Hansen that the method of release detection in place at the facility was to monitor the tanks twice daily via stick reading but that only one of several manifolded tanks of each type of gasoline was monitored. Mr. Hansen then spoke to the station manger, Suman Khanna, who was at another service station by telephone. Mr. Khanna said that the records of release detection were with him at the other service station and Mr. Hansen could not see them because Mr. Khanna was about to leave. Mr. Khanna also said that the method of release detection used was to monitor the tanks via stick readings twice

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[27] CX 4e, 6e; Halperin Affidavit ¶¶ 61-68; RPE (DKT. 0209) Ex. H and supplemental prehearing exchange, EX "A".

daily and that none of the tanks had been tightness tested in the last two years.[28]

Factual issues

Accelerated decisions are granted when there exists no genuine issue of material fact upon an issue, and a party is entitled to judgement as a matter of law. The burden of showing there exists no genuine issue of material fact with respect to Respondent's liability for the violations is upon Complainant as the moving party.[29]

Respondent argues that there is a genuine factual issue over whether Respondent should be held liable for the failure of a tenant/operator to follow Respondent's monthly instructions with respect to release detection and for the "deliberate refusals" of several of its operators/tenants to provide Respondent with records of manual inventory and stick readings. Thus, Respondent has put in issue its own good faith efforts to comply and the relevance of this to its liability.

Complainant's position is that the statute and regulations impose upon Respondent the obligation to have release detection in place and to maintain and have readily available current records of release detection. Impossibility of compliance, Complainant argues, is not a defense as a matter of law. Complainant also disputes that Respondent has made any factual showing to support its claims of

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[28] Hansen Affidavit (CX 9) ¶¶ 27-32.

[29] See Addickes V. Kress & Co., 398 U.S. 144, 157-160 (1970); 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2727.

its good faith efforts to achieve compliance from uncooperative tenants/operators.

There could be circumstances where it would be unreasonable to hold Respondent liable for the failure to make available the records when they were requested by the EPA, and for the incompleteness of the records when they were finally produced. If Complainant's argument is that Respondent must be held strictly liable without fault, I am not convinced that the statute and regulations require such a harsh result.[30] Complainant also takes issue with the merits of Respondent's claim that it was not possible for Respondent to do more than it did to comply, but this is a factual issue which is not ready for resolution on this motion.

Impossibility of performance is an affirmative defense and the burden is on Respondent to establish it. In summary judgement proceedings the moving party can be granted summary judgement where

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[30] I note that in the case of U. S. v. Bethlehem Steel Corp., 38 F. 3d 862 (7th Cir. 1994), cited by Complainant, the court, contrary to Complaint's reading of the case, did not reach the question of whether an impossibility defense may be asserted in RCRA actions because the court found that it was not impossible for Bethlehem Steel to meet the compliance schedule involved in that case. 38 F. 3d at 866. In U.S. v. T & S Brass & Bronze Works, Inc., 681 F. Supp. 314 (D.S.C.), aff'd in part and vacated in part on other grounds, the court found that the impossibility of the defendant to get insurance was created in part by the defendant's own conduct. 681 F. Supp. at 321. The court also found as factual matter that it was not impossible for the defendant to comply with the statutory deadline there imposed. Id. Thus, in each case, the defense of impossibility was rejected on its merits and not because it was per se an impermissible defense. Cf., Amoco Oil Co. v. EPA, 543 F. 2d 270 (D.C. Cir. 1970) (court struck down a regulation imposing liability upon a refiner for the unlawful sale of leaded gasoline by a dealer without proof of the refiner's fault).

the opposing party fails to show that there is a genuine factual dispute over a defense on which it has the burden and that the defense must be rejected as a matter of law.[31] Here, I find that Respondent has made a sufficient showing that there is a genuine factual issue over whether it should be held liable for not having the records of release detection available. The statements made by Respondent that it does not supply gasoline to the service stations and does not operate them have not really been contradicted and support Respondents claim that it was dependent upon the tenants/operators for complying with the release detection requirements. The credibility of Mr. Hansen's affidavit as to the release detection being done by the tenants/operators, which Respondent questions, is not a matter to be decided on an accelerated decision.

Respondent also argues that there exists a genuine issue with respect to whether the tanks at Penn & Flat were " empty" within the meaning of 40 C.F.R. § 280.70(a), so has not to require compliance with the closing requirements. This also is a defense on which Respondent has the burden.[32] I find, again, that Respondent has made a sufficient factual showing to defeat an accelerated decision on the issue. Respondent will be given the opportunity to show that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system,

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[31] Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[32] Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

remain in the systems.[33]

Respondent's defense that the UST systems were excluded under 40 C.F.R. § 280.10(b)(5), as systems that contained a de minimis concentration of regulated substances, is rejected. I agree with Complainant that the exclusion applies to cases where the concentration of gasoline in the residue is de minimis, and not to the quantity of gasoline residue in the tank. The EPA's interpretation does make sense because even a small amount of concentrated regulated substance could be harmful if released into the environment.

Complainant's request for an order compelling Respondent to comply with the requirements of 40 C.F.R. Part 280 is denied. Respondent's efforts to bring itself into compliance is proof that an order compelling compliance is not necessary. Complainant argues that the efforts fall short of complete compliance.[34] The deficiencies noted in Respondent's documentation of daily inventory control, however, may be deficiencies for which Respondent should not be held responsible. That is an issue that is still to be decided. As to the other asserted flaws in Respondent's documentation, Complainant has not shown that an order is necessary to correct them.

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[33] Respondent stated to the EPA in September 21, 1992, that USTs will be emptied in accordance with 280.70(a). CX 6a. Contrary to what Complainant claims, I do not find this to be an admission that that the residue in the tank on 9/21/92, exceeded the allowable limits.

[34] Affidavit of David Bernstein (CX 10).

Accordingly, Complainant's motion for a partial accelerated decision as to liability and for a compliance order is denied.

Gerald Harwood
Senior Administrative Law Judge

Dated: August 10, 1995

IN THE MATTER OF 1833 NOSTRAND AVENUE CORPORATION, Respondent
Docket Nos. [UST] II RCRA-93-0205, II RCRA-93-0206,
II RCRA-93-0207, II RCRA-93-0208, II RCRA-93-0209

Certificate of Service

I certify that the foregoing Order, dated 8/10/95, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

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Regional Hearing Clerk
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